MATTHIAS CHANG

v.

THE DISTRICT GRAND LODGE OF THE EASTERN ARCHIPELAGO & ORS

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
PS GILL JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: W-02-25-98]
23 DECEMBER 2004

CIVIL PROCEDURE: *Declaration - Application for - Whether necessary for applicant to show a cause of action - Whether sufficient for applicant to merely show such an interest in the subject matter of the action so as to justify the relief sought*

CIVIL PROCEDURE: *Declaration - Discretion to grant declaration - Factors influencing exercise of such discretion*

The appellant and respondent were Freemasons. There was apparently a complaint of alleged misconduct by the appellant, as a member of the Freemason Lodge. The second respondent, as District Grandmaster took up the complaint with the third respondent – the Deputy District Grandmaster who appointed a Committee of Enquiry comprising the fourth to seventh respondents to inquire into the said complaint. The appellant initially commenced suit in the High Court complaining about the constitutional set up of the Committee of Inquiry and the manner in which the inquiry was conducted. The appellant sought declarations to the effect that the Committee of Inquiry's actions were null and void. He also sought several other declarations. The High Court however dismissed the appellant's claim *inter alia* on the ground that there was no cause of action. The appellant appealed to the Court of Appeal. Before the commencement of the appeal the respondent filed a notice of motion *vide* encl. (9), seeking *inter alia* to introduce further evidence under r. 7 of the Rules of the Court of Appeal 1994. At para. 7 of his supporting affidavit (encl. 9), there was a sworn statement by the appellant to the effect that he had no desire to retain his membership in the Freemasons Lodge and has decided to pursue the appeal as a form of vindication for himself against the acts of the Committee of Inquiry of the Freemasons Lodge. Counsel for the

respondents argued that as the appellant had clearly expressed his decision not to remain as a member of the Freemasons Lodge, to prosecute the appeal further was not for the purpose of retaining his membership in the Freemasons Lodge, but rather for a collateral cause – vindication for the alleged wrong doings perpetrated by the Committee of Inquiry of the Freemasons Lodge.

Held (dismissing the appeal with costs)
Per PS Gill JCA delivering the judgment of the court:

[1] The Court of Appeal would agree that by the time the appeal came to be heard; the appellant had expressed a desire that he did not wish to be associated with the said Freemasons Society. However, this change of heart would not deprive the appellant of a cause of action or a right to proceed with the appeal. It was not necessary for an appellant, who sought relief by way of a declaratory judgment to show that he had a cause of action. What he had to show was that he was someone with such an interest in the subject matter of the action so as to justify seeking the relief. On the facts in the instant case, the appellant as a person, at the material time of the hearing of the originating summons, had an interest in seeking the relief that he had asked for. (p 104 e-f)

[2] However, it did not follow that just because the appellant had an interest in the cause of action, he would be entitled to the declaration he sought. This is because although the grant of declaratory relief is a useful remedy granted by court in appropriate cases, yet it is a discretionary remedy. (pp 104 g-h & 105 a-d)

[3] By the time the appeal was heard in the Court of Appeal, the appellant had expressed a desire not to be associated with the respondents' society. Thus, he could no longer be the recipient of any benefit of any of the declarations sought. This was evident when one looked at the declarations sought. Paragraph 7 of encl. (9) was the death knell for the appellant, as far as the Court of Appeal was concerned. The Court of Appeal chose not to exercise its discretion in allowing the declarations sought. (pp 105 d-g & 106 b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dan responden adalah ahli Freemasons. Suatu aduan salahlaku kelihatannya telah dibuat terhadap perayu selaku ahli Freemasons. Responden kedua, Grandmaster Kawasan, telah membawa aduan kepada responden ketiga – Timbalan Grandmaster Kawasan, yang kemudian melantik Jawatankuasa Siasatan terdiri dari responden-responden keempat hingga ketujuh bagi menyiasat aduan. Pada mulanya perayu memfail guaman di Mahkamah Tinggi mempersoalkan tentang keperlembagaan Jawatankuasa Siasatan dan cara siasatan dijalankan. Perayu memohon deklarasi bahawa tindakan-tindakan Jawatankuasa Siasatan adalah tak sah dan batal. Beliau juga memohon beberapa deklarasi lain. Mahkamah Tinggi bagaimanapun menolak permohonan perayu antara lain disebabkan ketiadaan kausa tindakan. Perayu merayu ke Mahkamah Rayuan. Namun, sebelum rayuan bermula, perayu memfail suatu notis usul melalui Lampiran (9), memohon antara lain untuk mengemukakan keterangan tambahan di bawah k. 7 Kaedah-Kaedah Mahkamah Rayuan 1994. Di perenggan 7 afidavit sokongannya, terdapat kenyataan bersumpah oleh perayu bahawa beliau tidak lagi berminat untuk memegang keahlian Freemasons Lodge dan bahawa beliau meneruskan rayuannya semata-mata untuk membuktikan kebenaran beliau ekoran tindakan Jawatankuasa Siasatan Freemasons Lodge. Peguam responden berhujah bahawa oleh kerana perayu telah menyatakan dengan jelas akan niatnya untuk tidak menjadi ahli Freemasons Lodge, maka penerusan rayuan bukanlah bertujuan mengekalkan keahlian perayu dalam Freemasons Lodge, tetapi adalah untuk maksud kolateral – menunjukkan kebenarannya atas perbuatan-perbuatan Jawatankuasa Siasatan Freemasons Lodge yang didakwa salah.

Diputuskan (menolak rayuan dengan kos)
Oleh PS Gill HMR menyampaikan penghakiman mahkamah:

[1] Mahkamah Rayuan bersetuju bahawa pada ketika rayuan sedia untuk didengar, perayu telah menyatakan hasrat bahawa beliau tidak ingin dikaitkan lagi dengan Pertubuhan Freemasons. Bagaimanapun, perubahan hati ini tidak menyisih perayu dari kausa tindakan atau hak untuk meneruskan rayuannya. Adalah tidak perlu bagi seorang perayu, yang memohon relif melalui suatu keputusan deklaratori, untuk menunjukkan bahawa beliau mempunyai kausa tindakan. Apa yang perlu ditunjukkan adalah beliau adalah orang yang mempunyai suatu kepentingan di dalam halperkara tindakannya yang membolehkannya menuntut relif. Atas fakta kes semasa, perayu, sebagai seorang individu, semasa pendengaran saman pemula, mempunyai kepentingan untuk mendapatkan relif yang dipohonnya.

[2] Namun begitu, ini tidaklah bermakna bahawa oleh kerana perayu mempunyai kepentingan di dalam kausa tindakan, maka dia semestinya berhak kepada deklarasi yang dipohon. Ini kerana, walaupun pemberian relif deklaratori adalah satu remedi berguna yang diberi oleh mahkamah dalam kes-kes yang sesuai, ia adalah remedi yang diberi menurut budi bicara.

[3] Pada ketika rayuan didengar di Mahkamah Rayuan, perayu telah menyatakan hasrat untuk tidak lagi dikaitkan dengan persatuan responden. Oleh itu, beliau tidak lagi boleh menjadi penerima bagi faedah-faedah yang mungkin didapati melalui deklarasi yang dipohon. Ini jelas apabila kita melihat kepada deklarasi yang dipohon. Pada pandangan Mahkamah Rayuan, perenggan 7 Lampiran (9) adalah petanda kemusnahan bagi perayu. Mahkamah Rayuan dengan itu memilih tidak melaksanakan budi bicara bagi membenar deklarasi yang dipohon.

Case(s) referred to:

Ainsbury v. Millington [1987] 1 All ER 929 ***(refd)***

Loknath Pudhan v. Brirendra Kumar Sahn [1974] AIR 505 ***(refd)***

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 SC ***(refd)***

Mohamed Noor Othman & Ors v. Hj Mohamed Ismail Hj Ibrahim & Ors [1988] 3 MLJ 84 ***(refd)***

Raphal Pura v. Insas Bhd & Ors [2003] 1 CLJ 10 ***(refd)***

Sun Life Assurance Co v. Jervis [1994] 1 All ER 469 ***(refd)***

Syed Kecik Syed Mohamed & Anor v. Board of Trustees of Sabah Foundation & Ors and Anor[1997] 1 MLJ 257 ***(refd)***

Tan Sri Yeop Othman Saat v. Mohamed Ismail [1982] 2 MLJ 177 ***(refd)***

For the appellant - Zainur Zakaria (Neoh Poh Cheng with him); M/s Zainur Zakaria & Co

For the 1st, 2nd & 3rd respondents - Cecil Abraham (Lorraine Cheah with him); M/s Shearn Delamore & Co

For the 4th, 5th & 6th respondents - DP Naban (BH Yap with him); M/s Lee Hishamuddin

Reported by Andrew Christopher Simon

JUDGMENT

PS Gill JCA:

The appellant an advocate and solicitor, and the defendant are members of a Fraternity, commonly known as the Freemasons under the jurisdiction of the organization known as the "United Grand Lodge of England, hereinafter referred to as ("the Grand Lodge"). The membership in areas outside the Untied Kingdom is governed by its subsidiary organizations commonly known as "District Grand Lodges" which are duly registered societies under the laws of the countries in which their members reside.

In Malaysia and Singapore, the Freemasons come under the jurisdiction of the "District Grand Lodge of the Eastern Archipelago" of which the 2nd respondent is the District Grand Master.

Within the District Grand Lodge there are several Private Lodges which come under its jurisdiction. The parties to this appeal are members of the Lodge and are commonly known as the Freemasons.

All Freemasons who are members of the respective District Grand Lodges owe allegiance to the Grand Lodge and are governed by the rules and regulations contained in the Book of Constitution of the said Grand Lodge. Further they are also governed by the "Antient Charges" which are akin to customs and conventions of the Fraternity as well as the several obligations they are obliged to take, without which they cannot be admitted as members.

All the provisions constitute a contractual relationship, which bind the members *inter se.*

Like any other society, the infraction of any provision entitles members to impose disciplinary measures on defaulted members such as censure, to suspend, or to expel.

The crux of this appeal, is basically about a complaint of alleged misconduct of the appellant, as a member of the Freemason Lodge. Consequently the 2nd respondent took up this complaint with the 3rd respondent who appointed a Committee of Enquiry comprising the 4th, 5th, 6th and 7th respondents to inquire into the said complaint.

It was the constitutional set up of the Committee of Inquiry and the manner in which the inquiry was conducted that formed the subject matter of Civil Suit Saman Pemula No. R2-24-26-97 (hereinafter referred to as the 1st suit). After conclusion of the hearing of that suit, the trial judge had this to say. I would reproduce the salient aspects of his judgment for the sake of clarity.

> As against Defendant No. 1, 2 and 3 I agree with the submission of their Counsel that the Plaintiff has failed to disclose a cause of action against them. The Plaintiff's claim is that the Committee of Inquiry constituted under the Rules which govern the members of the Fraternity had been biased against the Plaintiff and had acted contrary to the rules of natural justice. On the basis of such grounds the Plaintiff sought to apply for a declaration that the Committee of Inquiry's actions were null and void. In my view on these grounds alone no cause of action can be founded against Defendant No. 1, 2 and 3.
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> As to the issue whether the Committee of Inquiry had acted biasedly against the Plaintiff I am unable to find any reason to conclude that the Committee of Inquiry had acted unfairly against the Plaintiff. In fact I do find that the Committee of Inquiry had been very accommodating towards the Plaintiff. On the other hand it was the Plaintiff who was trying to be very uncooperative and difficult acting with preconceived ideas that the Committee were against him from the very beginning. I also find that there is no evidence to say that the Committee of Inquiry had acted contrary to the rules of natural justice. There was no basis for such allegation.
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> I have read the decision of YA Dato' RK Nathan in Guaman Sivil No: S2-23-32-96 (Also reported in MLJ-Supp. Series – [1997] 5 MLJ 727). I completely agree with the views expressed by YA Dato' RK Nathan that it is mandatory for the Plaintiff to exhaust his available remedies within the Fraternity before going to the Court. As a member of the Fraternity he is fully bound by he said Rules which require him to appeal to a higher body within the Society if he is dissatisfied with the decision or action of the Committee of Inquiry. In a Society a person after becoming a member agrees to be bound by the Rules governing the Society. So the Rules have to be adhered strictly by the member. It is different in the case of a statutory provision. Members of the public cannot be said to have given their agreement to exhaust their rights of appeal under the statute. As such they are at liberty to go straight to Court if they so wish, without the need to first exhaust their rights under the statute.

There was an ancillary suit filed *vide* G.S. No. S2-23-32-96, by the appellant against the 2nd respondent and another, wherein allegations were made by the appellant that the 2nd respondent and another had conspired to injure the integrity, profession, and occupation of the appellant in a systematic campaign of falsehood, misrepresentation, in abuse, of their respective offices of District

General Lodge of the Eastern Archipelago and District of Hong Kong and Far East. A stay order was granted against the suit on the basis that the appellant had not exhausted the domestic remedies within the society before filing the suit. So much for the historical background, and now to the matter at hand.

Before the commencement of the appeal the respondent had filed a notice of motion *vide* encl. (9) and it contained the following prayers:

1. kebenaran diberikan kepada perayu untuk mengemukakan keterangan lanjut menurut k. 7 Kaedah-kaedah Mahkamah Rayuan 1994;

2. Perayu dibenarkan memfailkan rekod rayuan tambahan untuk exh. "MC1" dan "MC2" yang dilampirkan kepada afidavit sokongan perayu atau sebagai alternatif exh. "MC1" dan "MC2" tersebut diterima masuk pada perbicaraan rayuan perayu;

3. Kos permohonan ini adalah kos dalam kausa;

4. Lain-lain relif yang Mahkamah Yang Mulia in anggap wajar.

The prayers were accordingly granted.

From the reading of the affidavit in support of this notice of motion, we gather that the stay order that was granted by the trial judge in Civil Suit No. S2-23-32-1996 was subsequently set aside by the Court of Appeal.

But what was more pertinent in the present affidavit in support of encl. (9) was this particular sworn statement that became the focus of our attention. It was para 7 of the said affidavit. For ease of reference it reads as follows:

> Saya sesungguhnya menyatakan bahawa surat ini adalah satu ancaman atas nyawa saya kerana membawa tindakan Guaman Sivil di atas dan rayuan ini dan kerana mendedahkan aktiviti-aktiviti persatuan yang subversif. Surat ini juga cuba menghauskan kesucian prosiding di Mahkamah Rayuan ini dan di Mahkamah Tinggi. *Saya sesungguhnya menyatakan bahawa saya tidak ingin memohon rahim atau menjadi ahli kepada persatuan yang subversif ini tetapi ini tidak bermakna saya tidak layak menerima penghakiman atas kesalahan yang dilakukan terhadap saya apabila saya masih seorang ahli.* (emphasis added).

By this sworn statement, it is our considered view that the appellant has no desire to retain his membership in the said Freemasons Lodge and has decided to pursue this course of action as a form of vindication for himself against the acts of the Committee of Inquiry of the Freemasons Lodge.

Quite naturally, the contents of para 7, encl. (9) became the object of strenuous submission by counsel for respondent who submitted that the appellant had clearly expressed his decision not to remain as a member of the Freemasons Lodge. Hence, to prosecute this appeal further was not for the purpose of retaining his membership in the Freemasons Lodge, but instead for a collateral cause, ie, vindication for the alleged wrong doings perpetrated by the Committee of Inquiry of the Freemasons Lodge.

The counsel for respondent further submitted that even if the court undertook to hear the appeal, we would not be deciding on an existing lis between the appellant and respondent parties before us, but would merely be expressing a view eventually, on a legal conundrum, which the appellant hopes to get decided in his favour, without in any way affecting the position between parties.

In our judgment, we agree that by the time the appeal came to be heard; the appellant had expressed a desire that he did not wish to be associated with the said Freemasons Society. However, this change of heart does not deprive the appellant of a cause of action or a right to proceed with the appeal. The case of *Tan Sri Yeop Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 (FC) is authority for the proposition, that it is not necessary for an appellant, who seeks relief by way of a declaratory judgment to show that he has a cause of action. What he must show is that he is someone with such an interest in the subject matter of the action so as to justify seeking relief. On the facts disclosed in this case we are aware that the appellant as a person, at the material time of the hearing of the originating summons, had an interest in seeking the relief that he had asked for.

But, it does not follow that, just because the appellant has an interest in the cause of action, he will be entitled to the declaration he seeks, because even though the grant of declaratory relief has, is, and will continue to remain a useful remedy granted by court in appropriate cases, yet it remains a discretionary remedy. To this end, it would be appropriate to repeat what was said by Hashim Yeop A Sani SCJ about the discretion of the court in the case of *Mohamed Noor bin Othman & Ors v. Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ at p. 84:

> It is also an established principle consistently followed by our courts that the issuing of a declaration is discretionary. The power to issue a declaration should be exercised with circumspection with a proper sense of responsibility and ought not to be exercised unless the circumstances justify it. See also the speech of Viscount Radcliffe in the Privy Council in *Ibeneweka v. Egbuna and Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi*.

The same judge delivered the decision of the Supreme Court in the case of *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh* [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 where he said:

> As regards the first preliminary objection it is our view that the matter had indeed, by the time the originating summons came before the learned judge, become academic. There was no living issue before the learned judge. There was no longer any lawful recipient of any benefit of any declaration sought in the originating summons. Cases cited by the learned judge *(Sun Life Assurance Company of Canada v. Jervis, Loknath Pudhan v. Birendra Kumar and Mohamed Noor bin Othman & Ors v. Haji Mohamed Ismail bin Haji Ibrahim & Ors)* constitute ample authorities for the court not to act in vain.

To reiterate, by the time the appeal came to be heard before us, the appellant had expressed a desire not to be associated with the Respondent's Society. Thus, he could no longer be the recipient of any benefit of any of the declarations sought and this becomes evident when one looks at the declarations sought. For convenience the declaration sought reads as follows:

1. that the Committee of Enquiry that sat on the 1st day of March, 1997 to enquire into the complaint of the 2nd Defendant against the Plaintiff be dissolved;

2. that the 3rd to the 6th Defendants be restrained from convening any sitting of the aforesaid Committee of Enquiry or conducting any proceedings or making any decision pursuant thereto;

3. that the 1st, 2nd and 3rd Defendants herein be restrained from appointing any Committee of Enquiry to enquire into or conduct any proceedings in respect of the complaint by the 2nd Defendant against the Plaintiff until the final disposal of the Plaintiff's appeal against the order of stay obtained in the Civil Suit No. S2-23-32-1996 filed by the Plaintiff against the 2nd Defendant and another.

Though we did proceed to hear other aspects of submissions from respective counsels, we must admit what dominated our thoughts was whether there was an existing lis between the appellants and respondents. Any determination we felt of this appeal on any other grounds would be an academic exercise because of the complete indifference in the appellant's stand *vide* para 7 of affidavit in encl. (9).

No doubt the appellant may have a desire to get a favourable decision from us, because he fears that other cases of a similar circumstance may arise with the Society whereby others who are affected may then rely on this decision as a guide. Noble as the intention is, a more convenient course is to patiently await a further claim and bring that claim if necessary before the Court of Appeal or Federal Court with parties on record, who are interested in prosecuting or resisting the appeal.

Hitherto, para. 7 of encl. (9) is the death knell for the appellants, as far as we are concerned. We choose not to exercise our discretion in allowing the declarations sought.

We have in the course of writing this judgment on the issue of lis between the parties, referred to a number of authorities both locally and foreign on this point. *Sun Life Assurance Co v. Jervis* [1994] 1 All ER 469, *Ainsbury v. Millington* [1987] 1 All ER 929, *Raphal Pura v. Insas Bhd & Ors* [2003] 1 CLJ page 10, and *Loknath Pudhan v. Brirendra Kumar Sahn* [1974] AIR 505.

In conclusion, we wish to merely quote the decision of Edgar Joseph Jr FCJ (as he then was) in *Syed Kecik bin Syed Mohamed & Anor v. Board of Trustees of Sabah Foundation & Ors and Another* [1997] 1 MLJ 257 wherein his Lordship stated:

> Having said that, this Court does not sit to decide abstract on academic questions of law regarding which the parties are not in dispute. As Lord Bridge stated in *Ainsbury v. Millington* [1987] 1 All ER 929:
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> > When the appeal was called on for hearing before the Appellate Committee your Lordships required to be satisfied that the appeal could properly be entertained having regard to the termination of the parties' tenancy of 24 Marlowe Close to which the respondent's case had directed attention. The principle was clearly stated by Viscount Simon LC in *Sun Life Assurance Co of Canada v. Jervis* [1944] 1 All ER 469 at 470-471, [1944] AC 111 at 113-114, where he said:
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> > > I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not e deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties … I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

> It is always been a fundamental feature of our judicial system that Court decides dispute, between the parties before them, they do not pronounce judgment on an abstract question of law when there is no dispute to be resolved.

This dicta neatly encapsulates the position of the courts in deciding on issues which do not have an impact on the position of the parties.

On these grounds the appeal is dismissed with costs.